FEB 16 1952

Supreme Court of the United States

October Term, 1951

No. 593

JAMES B. MAGENIS, F. W. APPLESTEIN, CHARLES A. BODIE, *et als.*,

Petitioners,

against

BOSTON RAILROAD HOLDING COMPANY, *et als.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS AND BRIEF IN SUPPORT THEREOF

WILLIAM T. GRIFFIN,
Attorney for Petitioners.

HENRY COHEN,
ARTHUR KARGER,
Of Counsel.

307 — BAR PRESS INC., 54 LAFAYETTE ST., NEW YORK 13 — WA. 5-3432-3

INDEX

	PAGE
Petition	1
Summary Statement of Matter Involved	1
Statement on Jurisdiction	5
Questions Presented	7
The Petitioners Herein	8
Prayer for Writ	10
Brief	11
Statement	11
Statement of Facts	12
The Holding Company and Its Securities Guaranteed by the New Haven	12
The Anti-Trust Proceedings; the Priority Established	15
The Reorganization Proceedings of the New Haven	19
State Court's Decision	21
POINT I. The final decree in the reorganization proceedings did not alter the priority to which the publicly held shares of preferred stock were entitled	23
The Power of the Federal Court	25
The Effect of the Plan of Reorganization	27
Improper Effect Given to the Discharge, Under General Law of Bankruptcy	28
Conclusion	30

Cases Cited

	PAGE
Avery v. Popper, 179 U. S. 305	5
Ferris v. Prudence Realization Corp., 292 N. Y. 210, 323 U. S. 650	22
Howat v. Kansas, 258 U. S. 181	26
Innes, In re, 140 F. 2d 479 (C. C. A. 7th) cert. den. 322 U. S. 736	29
Matter of Title & Guaranty Co. of Sullivan County, 275 N. Y. 347	21
Stoll v. Gottlieb, 305 U. S. 165	5
Swift v. United States, 276 U. S. 311	26
Title & Mortgage Guaranty Co. of Sullivan County, Matter of, 275 N. Y. 347	21
Toucey v. New York Life Ins. Co., 314 U. S. 118, fn. 1	5
United States v. United Mine Workers, 330 U. S. 258	26
Zavelo v. Reeves, 227 U. S. 625	29

Statutes

Massachusetts:	
St. 1909, Chap. 519	12, 13
St. 1910, Chap. 639	13, 14
St. 1946, Chap. 518	21
United States Bankruptcy Act, Sec. 77	4
United States Code:	
11, Sec. 205	4, 19, 28
28, Sec. 1257(3)	5

Other Authorities

Collier on Bankruptcy, Sec. 17.27, pp. 1654-1655	29
Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1951 ed. by Wolfson & Kurland) p. 40	5

Supreme Court of the United States

October Term, 1951

No. 593

JAMES B. MAGENIS, F. W. APPLESTEIN, CHARLES A. BODIE, *et als.*,

Petitioners,

against

BOSTON RAILROAD HOLDING COMPANY, *et als.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

TO THE SUPREME COURT OF THE UNITED STATES:

The petitioners hereinafter named hereby respectfully petition this Court for a writ of certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts to review a decision of that Court made and entered on the 9th day of November, 1951, in a proceeding instituted in that Court in the first instance.

Summary Statement of Matter Involved

The proceeding here involved is a representative suit brought by the Delaware and Hudson Company (hereinafter referred to as the Delaware), as a preferred stockholder of the Boston Railroad Holding Company, a Massachusetts corporation (hereinafter referred to as the Hold-

ing Company). The Delaware sued on its own behalf and on behalf of other preferred stockholders of the Holding Company similarly situated. Its petition seeks a declaration that these stockholders are entitled to priority in the liquidation proceeding, now pending in Massachusetts, of the Holding Company.

All the common stock, and all but 24,150 shares of the outstanding preferred stock, of the Holding Company are owned by the New York, New Haven & Hartford Railroad Company (hereinafter referred to as the New Haven). The remaining 24,150 shares of preferred stock, all issued under a guaranty from the New Haven, are publicly held; and the Delaware is the owner of 10,000 of such shares, while the petitioners hereinafter named are the owners in the aggregate of 2,144 of such similarly publicly held shares.

The Holding Company was ordered dissolved by act of the Massachusetts legislature in 1946 (St. 1946, Chap. 518); and the Delaware thereafter instituted this proceeding in the Massachusetts Court for a determination that the publicly held preferred stock is entitled to priority as against the preferred stock held by the New Haven.

The Holding Company was organized in 1909 by special act of the Massachusetts legislature (Stat. 1909, Chap. 519) for the purpose of holding the stock of the Boston & Maine Railroad, then owned (allegedly illegally) by the New Haven. All the common and preferred stock of the Holding Company was originally issued to the New Haven, which thereafter sold 28,000 shares of the preferred to the general public with its guaranty (as required by the Massachusetts statute—Stat. 1909, Chap. 519, Sec. 4) of the payment of dividends and principal.

In the instant proceedings before the Massachusetts Court, a priority was claimed in favor of the publicly

held preferred stock as against the stock held by the New Haven, on the ground, among others, that such a priority had been previously expressly adjudged by decrees of the federal courts. And emphasis was placed upon a decree entered on June 4, 1923, in the United States District Court for the Southern District of New York, in an anti-trust suit brought by the United States against the New Haven, the Holding Company and certain other corporate and individual defendants.

That decree had its roots in an earlier federal decree, made in 1914, which ordered the New Haven to divest itself of its stock in the Holding Company by transferring it to trustees who were directed to dispose of it in such manner as not to disturb the statutory priority of the publicly held shares. The decree of 1923, upon which reliance was placed below, authorized the New Haven to regain possession of such Holding Company stock, but expressly declared that the right of the publicly held preferred shares "to be preferred in any Liquidation of said Boston Railroad Holding Company" should not in any respect be disturbed.

Another relevant decree, incorporating a Plan of Reorganization, resulted in 1947 after the New Haven filed its petition in reorganization; that decree, again, provided that it should not "impair any right of the public holders" "to realize on the lien or security of the shares of the capital stock of the Boston and Maine Railroad held by said Holding Company * * *."

The Massachusetts Court recognized in its opinion denying priority (reported in 102 N. E. 2d 67) that as a matter of Massachusetts law and because of the New Haven's guaranty, the publicly held preferred stock would have been entitled to priority in any liquidation of the assets of the Holding Company. The Court held, however, that since in 1947 the New Haven had been dis-

charged from liability on that guaranty in the reorganization proceedings of the New Haven (Sec. 77, Bankruptcy Act; U. S. C. Title 11, Sec. 205), the priority necessarily fell with that discharge of liability. The Court interpreted the 1923 anti-trust decree as not independently adjudicating the existence of any priority on the part of the publicly held preferred stock, but merely that it "undertook to confirm and perpetuate" a priority established under Massachusetts law; it similarly construed the 1914 decree and the 1947 Plan of Reorganization as not establishing but merely recognizing such a priority.

The Massachusetts Court, in so denying the right of priority to the publicly held preferred stock, acted in flagrant disregard of the provisions of the federal decrees here referred to. Priority was established by the decree in 1914; its existence was adjudicated and perpetuated by the decree entered in 1923; and in the reorganization proceedings resulting in the Plan for the New Haven which was confirmed in 1947, the right to priority was expressly preserved to the public preferred stockholders. The failure of the State Court to give effect to a priority established by three federal decrees presents an important federal question.

We emphasize the conflict of the decision of the Massachusetts Court with the provisions of the Plan of Reorganization which, although providing for the discharge of the New Haven's liability on its guaranty, expressly directed that:

> "Nothing herein contained shall in any way impair any right of the public holders of the 24,150 preferred shares of the Boston Railroad Holding Company to realize on the lien or security of the shares of the capital stock of the Boston & Maine Railroad held by said Holding Company whether such right be at common law or under the statutes of Massachusetts, particularly Stat. 1909, Chap. 519, and Stat. 1910,

Chapter 639, or under the decrees of the United States District Court for the Southern District of New York under date of October 17, 1914, and June 4, 1923."

It seems plain that the purpose of this provision was to avoid any possible inference that the discharge of liability on the guaranty would in any way defeat or impair the priority of the publicly held preferred stock.

The decision of the Massachusetts Court deprives the public stockholders of the Holding Company of rights declared and confirmed by the anti-trust decrees of 1914 and 1923 and by the above quoted provisions of the 1947 Plan of Reorganization. And we submit that the Massachusetts Court also gave undue effect to the discharge of the guaranty, in that the Court overlooked or misunderstood the settled doctrine of bankruptcy, that a discharge does not extinguish the obligation itself.

Statement on Jurisdiction

The jurisdiction of this Court rests on 28 U. S. C. Sec. 1257(3). It is settled that where, as in this case, a State Court fails to give due effect to a judgment or decree of a Federal Court, a federal question is presented which is reviewable by this Court on certiorari. *Stoll* v. *Gottlieb*, 305 U. S. 165, 167; *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 129, fn. 1; see Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1951 ed. by Wolfson & Kurland), p. 40. A federal question reviewable by this Court is likewise presented where the case involves the construction of a judgment or decree of a Federal Court. See *Avery* v. *Popper*, 179 U. S. 305, 314.

As noted above, the proceeding herein was commenced in the first instance in the Supreme Judicial Court of

Massachusetts, the court of last resort of that State. Two opinions were rendered by that Court, a majority opinion by Justice Spalding, and a concurring opinion by Justice Counihan. The opinions are reported in 102 N. E. 2d 67. The order of the Massachusetts Court determining the proceeding was made and entered on November 9, 1951. Upon application made by the petitioners herein prior to the expiration of ninety days from that date, an order was granted by Mr. Justice Frankfurter on January 29, 1952, extending the time to file this petition to and including February 18, 1952. This petition for certiorari is filed within that period.

The contention that the publicly held preferred stock is entitled to priority as against the preferred stock owned by the New Haven, on the basis of the Plan of Reorganization approved in the New Haven's reorganization proceedings and on the basis of the 1923 anti-trust decree, was distinctly raised in the petition of the Delaware filed in the Massachusetts Court (Record, pp. 4, 7-8). These contentions, as well as the contention that the Massachusetts Court gave undue scope to the effect of the discharge in the reorganization, were expressly passed upon and rejected by the Massachusetts Court in its opinion.

The petitioners herein are forty-eight in number. They are the beneficial owners, in the aggregate, of 2,144 shares of the publicly held preferred stock of the Holding Company. Pursuant to order of the Massachusetts Court, notice of the petition by Delaware in this proceeding was given to all stockholders of record of the Holding Company, as well as to other interested parties (Record, pp. 18-19). No public preferred stockholders, other than the Delaware, made any formal appearance, but the determination of the Massachusetts Court is nevertheless binding upon them, since it was rendered in a representative suit brought on behalf of all public holders of preferred stock, including the present petitioners.

Out of an abundance of caution, and in order to remove any possible doubts as to their standing here, the petitioners moved the State Court on February 6 for permission to intervene in the proceeding and for a rehearing. Argument was heard on this petition before Lummis, J., and an order was entered on the same day denying the petition without prejudice. The Court stated its decision orally in open court as follows:

> "The Supreme Court of the United States will probably allow these parties to be heard in some form and I think that I will let that Court be the one to do it. Motions denied without prejudice."

Since the petitioners are bound by the decision of the State Court, they are in a sufficient sense parties to the proceedings, and we submit they have standing to petition this Court for a writ of certiorari. We understand that the Delaware is applying for a writ of certiorari. To hold that these petitioners are concluded by the decision below and that they are nevertheless remediless to seek redress for an invasion of their rights protected by the Federal Constitution, would, we submit, itself amount to a clear deprivation of such rights.

Questions Presented

1. Whether the right of priority of the public preferred stockholders in this case, expressly declared and confirmed by decrees entered in 1914 and 1923 in anti-trust proceedings and by the Plan of Reorganization in the reorganization proceedings in 1947, was affected by the discharge of the debtor in the reorganization proceedings.

2. Whether the discharge of liability in the reorganization proceedings could in any event have any greater effect than that of merely barring the public preferred

stockholders from bringing suit against the New Haven on the guaranty.

3. Whether the clear provisions of a Plan of Reorganization approved by a Federal Court in reorganization proceedings, declaring and confirming a right of priority to security holders of a company in which the debtor in reorganization also has an interest, are binding upon the debtor, notwithstanding that the consummation decree thereafter entered makes no reference to such priority and discharges the debtor from liability on a guaranty affecting such securities.

The Petitioners Herein

The names and addresses of the petitioners and the number of shares of the preferred stock of the Holding Company which each of them beneficially owns, are as follows:

Name	*Address*	*No. of Shares*
James B. Magenis	68 Payne Whitney Lane, Manhasset, L. I., N. Y.	80
F. W. Applestein	Baltimore, Md.	15
Chas. A. Bodie	" "	10
F. W. Beachley	" "	5
Eliz. B. Bower	" "	10
C. P. Boyce	" "	100
A. M. & L. G. Carl	" "	20
Ethel B. Cullen	" "	30
Wm. A. Danzer	" "	10
Eleanor S. Dryden	" "	20

Name	*Address*	*No. of Shares*
Margaret M. Dunn	Baltimore, Md.	10
Arthur Jennings	" "	25
E. O'D. Evans	" "	5
L. E. & M. Elliott	" "	5
Emma M. Getz	" "	5
Robert Getz	" "	5
Arthur Jennings	" "	25
Mrs. G. R. Green	" "	6
E. Lynch Gross	" "	10
Wm. B. Gross	" "	10
Myrtle M. Greenstreet	" "	2
Mrs. R. D. Issacs	" "	15
N. W. Kidd	" "	55
W. E. & M. Knecht	" "	5
A. & M. Larsen	" "	10
M. & L. Leather	" "	10
Nancy B. Levering	" "	62
John M. McCall	" "	15
Murphy Favre	" "	35
Pitt C. Gordon	" "	30
Blanche F. Powell	" "	5
O. H. & M. G. Schroedl	" "	10
Isador Schultz	" "	30
Seidel Cleaners & Dyers	" "	30
W. J. & H. E. Seidel	" "	10
Norman Strippy	" "	10

Name	*Address*	*No. of Shares*
E. Gertrude Smith	Baltimore, Md.	20
J. L. & H. Tunstead	" "	5
Jessie K. Wehner	" "	95
Constance A. Weinberg	" "	40
Edward F. Wehner	" "	10
Margaret B. Wilkens	" "	10
Edward F. Williams	W. Newton, Mass.	419
Lida B. Whitaker	Baltimore, Md.	3
George L. Zimmerman	" "	145
L. S. Zimmerman	" "	180
Stein Bros. & Boyce (Co.-Partnership)	" "	377
Stein Bros & Boyce Corp. (Org. Under Laws of State of Md.)	" "	100

Prayer for Writ

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue out of this Court to the Supreme Judicial Court of the Commonwealth of Massachusetts, directing that Court to certify and send to this Court a transcript of all the proceedings of that Court in this case, to the end that this cause may be reviewed and determined by this Court; that the order and decree of the Supreme Judicial Court of the Commonwealth of Massachusetts be reversed; and that your petitioners be granted such other and further relief as may be proper.

Dated: New York, February 15, 1952.

Respectfully submitted,

WILLIAM T. GRIFFIN,
Attorney for Petitioners.

Supreme Court of the United States

October Term, 1951

No. 593

JAMES B. MAGENIS, F. W. APPLESTEIN, CHARLES A. BODIE, *et als.*,

Petitioners,

against

BOSTON RAILROAD HOLDING COMPANY, *et als.*,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A summary statement of the matter involved, as well as the required statements with respect to the jurisdiction of this Court, the questions presented, the reasons for the issuance for the writ, and the opinion of the Court below are set forth in the accompanying petition (pp. 1-10, *supra*). Additional pertinent facts are stated in the course of this brief.

Statement

This proceeding was instituted in the Supreme Judicial Court of Massachusetts on a petition by the Delaware, as a preferred stockholder of the Holding Company. The Delaware petitioned in its own behalf and in behalf of such other preferred stockholders of that Company simi-

larly situated as might join in the petition. The petition sought a determination that the Delaware and all other holders of the preferred stock of the Holding Company, other than the New Haven, are entitled to priority in the liquidation of the assets of the Holding Company, as against the preferred stock held by the New Haven.

Pursuant to an order of the Massachusetts Court, notice of the proceeding was given to all stockholders of record of the Holding Company, as well as to other interested parties (Record, pp. 18-19). Answers to the petition were filed by the New Haven and by the receiver of the Holding Company (Record, pp. 22-30, 30-31). Pursuant to stipulation, a statement of agreed facts was submitted to the Court. In accordance with the State Court's practice, one of the Justices of the Court reported the case, without decision, for consideration and determination by the full Court on the pleadings and upon the agreed statement of facts (Record, p. 1). A decision was thereafter rendered by the full Court, determining that the Delaware and other public owners of the preferred stock of the Holding Company were not entitled, as against the preferred stock held by the New Haven, to any priority in the liquidation of the Holding Company.

Statement of Facts

The agreed statement of facts, together with the exhibits annexed thereto, appears at pages 33-84 of the record below.

The Holding Company and Its Securities Guaranteed by the New Haven.

The Holding Company was created by special act of the Massachusetts legislature (St. 1909, Chap. 519) for

the purpose of holding securities of the Boston and Maine Railroad. The 1909 Act authorized the Holding Company to issue only one class of stock, common or general stock, and all that stock was acquired by the New Haven. The New Haven had previously held stock in the Boston & Maine directly; questions were officially raised as to its power to hold stock in another railroad company; and presumably the legislation of 1909 was provided as the answer. The Holding Company acquired, and still holds, as its principal assets, common and preferred stock of the Boston and Maine Railroad.

In 1910 another statute was enacted (Chap. 639) amending the charter of the Holding Company to permit it to issue, and the New Haven to acquire, preferred stock upon certain conditions set forth in that statute and in the 1909 Act. One of those conditions, set forth in the 1909 Act, was:

> "Section 4. Any railroad corporation incorporated at the date of the passage of this act under the laws of this commonwealth may guarantee the principal of and the dividends and interest upon the capital stock, bonds, notes and other evidences of indebtedness of said Boston Railroad Holding Company, and may acquire and hold said stock, bonds, notes and other evidences of indebtedness; *provided, however, that the shares of stock of said Boston Railroad Holding Company shall not be sold or transferable until said stock has been guaranteed as hereinbefore provided.*" (Italics ours.)

Presumably, the theory of this legislation was that any money provided by the public, which would, of course, go either for the purchase of more Boston and Maine stock or for the reimbursement to the New Haven for such purchases, ought not to be furnished without the New Haven's guaranty.

The 1910 Act (Sec. 2) also provided a security in addition to the guaranty: a stautory lien in favor of the preferred stock of the Holding Company upon all the stock of the Boston and Maine Railroad at any time held by the Holding Company:

> "Subject only to the rights of creditors of said Boston Railroad Holding Company existing at the date of the stockholders' meeting at which any of said preferred stock is first authorized, said preferred stock, to the amount thereof at par at any time outstanding, and of all accrued and unpaid dividends thereon, shall be and constitute a charge and lien upon, and be secured by, all stock of the Boston and Maine Railroad at any time held by said Boston Railroad Holding Company."

In addition, the 1910 legislation made the guaranty of the New Haven specifically applicable to the preferred stock. Section 5 of the 1910 Act authorized any railroad company owning any of the common stock of the Holding Company to acquire, hold, own and sell any of the preferred stock authorized by the Act and further provided that any such corporation "may guarantee the payment of the stipulated dividends thereon, and of the par value thereof in case of liquidation or distribution" of the Holding Company.

The Holding Company in 1910 and 1911 issued to the New Haven 272,939 shares of its preferred stock, constituting all of its authorized preferred stock. These shares were issued in payment of loans made by the New Haven to the Holding Company to enable the Holding Company to buy Boston and Maine stock. In 1911 the New Haven sold 28,000 shares of such preferred stock to the general public. The certificates for these publicly held shares were endorsed with the full guaranty of the New Haven:

the statute of course permitted nothing less (Record, p. 36):

> "For value received, The New York, New Haven & Hartford Railroad Company, a corporation established and acting under the laws respectively of Connecticut, Massachusetts, and Rhode Island, hereby guarantees the payment of cumulative dividends on the shares of stock represented by this certificate at the rate of four per centum (4%) per annum as stipulated in this certificate, and the payment of one hundred dollars ($100) upon each share of said stock in case of liquidation or distribution of Boston Railroad Holding Company and of any deficiency resulting from a sale under the provisions of Section 4 of Chapter 639 of the Acts of Massachusetts of the year 1910."

Of the 28,000 shares of preferred stock thus issued, 1,030 are now owned by the Holding Company, 2,820 by the New Haven, 10,000 by the Delaware, 2,144 by these petitioners, and the remainder by other members of the public. The New Haven's holdings of preferred stock comprise 247,759 shares in all.

The Anti-Trust Proceedings; The Priority Established.

Indisputably, the Holding Company was a device, obvious enough, by which the New Haven procured and exercised control of the Boston and Maine. On this ground, as well as upon others, the United States in 1914 brought a suit in equity in the United States District Court for the Southern District of New York, against the New Haven and the Holding Company, alleging violations of the anti-trust laws. On October 17, 1914, a consent decree (printed in the record below at pp. 62-77) directed the New Haven to transfer all of its stock in the Holding Company to certain named trustees, who were

ordered to take appropriate steps to sell the shares of stock of the Boston and Maine Railroad owned by the Holding Company and then to dissolve the Holding Company. The decree took precautions in order to safeguard the preference, on the basis of which preferred shares had been sold to the public. The decree provided, first, that the trustees "shall make proper arrangements to protect the rights of preferred stockholders of the Holding Company" (Record, p. 63). But the decree went much further than this simple declaration. It defined the implications of the preference and it declared them in terms of *a priority* of the publicly held preferred stock over the preferred stock held by the New Haven. It expressly directed that any sale of the Boston and Maine stock should be made "subject only to the lien of the 28,000 shares of preferred stock of the Holding Company held by other persons" than the New Haven (Record, p. 64); and that out of the proceeds of any sale, the public holders of those 28,000 shares of preferred stock were to be paid all sums due them prior to any payment to the New Haven (Record, p. 65). The decree, in addition, provided as follows (Record, p. 64):

> "Whenever in their judgment it shall be necessary, the trustees may take proper steps to subordinate the statutory lien enjoyed by the preferred shares of the Holding Company held by them to the lien of the 28,000 preferred shares of the Holding Company held by others; but the lien of the preferred shares held by them shall attach to any proceeds from the sale of the shares of the Maine Company remaining after satisfying the claims of the persons holding the said 28,000 preferred shares."

In substance, the effect of this decree—in the absence of creditors of the Holding Company, and there are no creditors—was to dissolve the lien of the New Haven with

respect to the preferred shares. At least the result of the decree was to make meaningless any definition of the rights of the New Haven as those of a lien-holder.

The decree provided that the trustees should use their best efforts to complete the sale of the Boston and Maine stock before January 1, 1917 (Record, p. 64). That time was, however, extended by subsequent decrees, and on May 8, 1923 the Boston and Maine stock was still unsold. On that day, the New Haven filed a petition with the United States District Court (Record, pp. 78-81), requesting a modification of the 1914 decree so as to provide for a transfer by the trustees of the Holding Company stock, back to the New Haven. The New Haven in its petition directly requested the Court to make provision preserving the right of the publicly held preferred stock "to be preferred in any liquidation" of the Holding Company (Record, p. 80). A decree was rendered on June 4, 1923 granting the relief virtually as requested. The decree (Record, pp. 82-84) authorized the retransfer of the Holding Company stock to the New Haven, but it preserved the priority of the holders of the publicly held preferred stock of the Holding Company. The decree thus provided as follows (Record, pp. 82-83):

> "ORDERED that said decree entered October 17, 1914, be amended by striking out all the provisions in paragraphs numbered First and Second of said decree, excepting that the right attaching to the 28,000 shares of preferred stock of the Boston Railroad Holding Company held by other persons to be preferred in any Liquidation of said Boston Railroad Holding Company to the remaining shares of the common and preferred stock of the said Boston Railroad Holding Company held by the New York, New Haven and Hartford Railroad Company, shall in no manner be diminished or impaired, and the certificates of said 28,000 shares of preferred stock shall be presented at

> the office of the Boston Railroad Holding Company in Boston, Massachusetts, to be stamped as entitled to such preference."

We emphasize the phrase "in any Liquidation". At the time this provision was written, the only liquidation which had been in contemplation was a statutory liquidation by trustees acting under a federal decree. In that liquidation, it was clear, the publicly held preferred stock had no mere inchoate preference under general equitable principles: it was adjudicated that the stock had a prior claim to the proceeds of the sale of the assets of the Holding Company. By its decree of 1923, the Federal Court ended the possibility of any liquidation in and under the auspices of its trustees, but it explicitly made a continuing direction that the right to be preferred " * * * in *any* Liquidation of said Boston Railroad Holding Company" "shall in no manner be diminished or impaired".

Pursuant to that decree, the stock of the Holding Company in the hands of the trustees was returned to the New Haven, and at or about that time the Holding Company caused an endorsement to be stamped on the certificates of all of the publicly held 28,000 shares of preferred stock of the Holding Company, as follows (Record, pp. 44-45):

> "The shares represented by the within certificate are entitled to *preference in liquidation* according to the terms of the decree entered by the District Court of the United States for the Southern District of New York on October 17, 1914, as modified by the decree of said court entered on the 4th day of June, 1923, in the case of the United States of America v. The New York, New Haven and Hartford Railroad Company and others." (Italics added.)

Here there would seem to be the plainest affirmation by the New Haven itself of the rights of the publicly held preferred shares to priority as against the New Haven.

The Reorganization Proceedings of the New Haven.

On October 23, 1935, the New Haven filed a petition for reorganization under Section 77 of the United States Bankruptcy Act in the United States District Court for the District of Connecticut (U. S. Code, Title 11, §205). Pursuant to order of the District Court dated March 13, 1936, the president of the Holding Company filed a claim (No. 82) "on behalf of the 24,150 shares of the Holding Company preferred stock outstanding in the hands of the public".

By order entered March 6, 1944 the District Court approved a plan of reorganization for the New Haven, which had been previously approved and certified by the Interstate Commerce Commission. That plan provided in part as follows (Record, pp. 38-39):

> "Sec. J. Clause (17). The common stock available for distribution to the holders of unsecured obligations and claims shall be distributed among them upon the basis of the relationship between the amount of each claim as finally allowed by the Court to the total amount of all such claims. The public holders of 24,150 preferred shares of the Boston Railroad Holding Company shall, to the extent finally allowed by the Court for any breach of the contract of guaranty, both for par value and dividends, be included among the holders of unsecured obligations and claims.
>
> Sec. K. * * * The principal debtor's guaranties of the bonds of the New York, Westchester and Boston Railway Company * * * and of the preferred stock

of the Boston Railroad Holding Company shall not be assumed by the reorganized company. No payment shall be made by the reorganized company upon, or on account of, such guaranty of the preferred stock of the Boston Railroad Holding Company, except as provided in Clause (17) of Section J hereof. *Nothing herein contained shall in any way impair any right of the public holders of the 24,150 preferred shares of the Boston Railroad Holding Company to realize on the lien or security of the shares of the capital stock of the Boston & Maine Railroad held by said Holding Company whether such right be at common law or under the statutes of Massachusetts, particularly Stat. 1909, Chap. 519, and Stat. 1910, Chapter 639, or under the decrees of the United States District Court for the Southern District of New York under date of October 17, 1914, and June 4, 1923.*" (Italics ours.)

We submit, and shall argue (Point I, *infra*), that this decree itself is dispositive of the issue in this case. The Federal Court recognized the various possible bases upon which the right of priority might be considered to stand—the State's common law, the State legislation of 1909 and 1910, or the federal decree of 1914, or the decree of 1923—and it provided that whatever the source of the priority, the decree in reorganization should not disturb it, notwithstanding that the reorganized company was not to assume any liability upon the obligation itself.

It is consistent that on August 4, 1944, the Court entered an order which allowed a claim for breach of the New Haven's guaranty of cumulative dividends upon the 24,150 publicly held preferred shares, to the extent of $32 per share, and disallowed all other claims on behalf of the holders of such stock. Equally consistently, the Court allowed nothing in connection with the New Haven's guaranty of the $100 par value principal amount of each share. On September 11, 1947 an order entitled "Con-

summation Order and Final Decree" was entered, which granted in general terms a discharge of all the New Haven's obligations, debts and liabilities, and provided for the vesting in the reorganized company of the New Haven's property and estate free and clear of all claims, liens and encumbrances.

In 1946 the Holding Company was dissolved by act of the Massachusetts Legislature (St. 1946, Chap. 518). Section 4 of that statute provided in part as follows:

> "Nothing in this act shall affect the rights of the holders of the publicly held or other preferred stock of Boston Railroad Holding Company, or the lien or liens or priority or priorities, existing in favor of such stock or any thereof. * * * "

The statute further provided for the recognition of the rights of such holders "if the court shall determine that such preferred has rights different from the rights of the other preferred" stock of the Holding Company.

State Court's Decision

The Massachusetts court has determined that the publicly held preferred stock is not entitled to any priority in liquidation as against the preferred stock held by the New Haven. The decision directly rejects the contentions here urged as a basis for review upon certiorari by this Court, and does not rest on any independent non-federal basis.

In the State Court the petitioners' claim of a priority as against the New Haven's preferred stock, was predicated not only upon the federal decrees but also upon the ground, available in the State Court, that priority is dictated by equitable principles established by such cases as *Matter of Title & Mortgage Guaranty Co. of Sullivan*

County, 275 N. Y. 347 and *Ferris* v. *Prudence Realization Corp.,* 292 N. Y. 210, 323 U. S. 650.

The Massachusetts Court accepted those principles as the law of Massachusetts: "that a guarantor of mortgage certificates, who also has an interest in the mortgage, cannot share in the proceeds of its collection until the certificate holders are paid, unless there is a clear reservation in the certificate of the right of the guarantor to share on a parity with other certificate holders" (Record, p. 96). The Court further indicated its view that that principle was applicable in the instant case so long as the New Haven's guaranty of the publicly held preferred stock continued in effect (Record, pp. 96, 98).

The Massachusetts Court, however, held that the priority fell with the discharge of the New Haven, in the reorganization proceedings, from further liability on its guaranty of the publicly held preferred stock (Record, pp. 97, 98).

We submit that the Massachusetts Court erred in holding that the priority had existence and survived only by reason of Massachusetts principles of equity. The Massachusetts Court, in taking this view, disregarded the federal decrees which expressly adjudicated the existence of a priority and expressly defined its scope. That Court further erred in holding that the reorganization decrees had the effect of destroying that priority.

POINT I

The final decree in the reorganization proceedings did not alter the priority to which the publicly held shares of preferred stock were entitled.

We have pointed out above that the decree entered in 1914 in the anti-trust suit directed that the New Haven's holdings of the stock of the Holding Company be transferred to trustees and that the trustees sell the Boston and Maine stock held by the Holding Company; that the decree defined the priority to be accorded the publicly held preferred stock of the Holding Company, as against the New Haven's stock, in distributing the proceeds of the sale; that in 1923, no sale having been made, the New Haven petitioned for a modification of the 1914 decree and for a retransfer to it of the Holding Company's stock; and that in its petition the New Haven specifically asked, as a condition of the requested modification:

> "* * * that the right attaching to the 28,000 shares of preferred stock of the Boston Railroad Holding Company held by other persons, to be preferred in any liquidation of said Boston Railroad Holding Company to the remaining shares of the common and preferred stock of said Boston Railroad Holding Company held by the New York, New Haven & Hartford Railroad Company, shall be in no manner diminished or impaired" (Record, p. 80).

The decree entered on that petition similarly explicitly provided that "the right attaching to such shares of preferred stock "to be preferred in any Liquidation of said Boston Railroad Holding Company", as against the New Haven's holdings of stock in the Holding Company "shall in no manner be diminished or impaired and the certifi-

cates of said 28,000 shares of preferred stock shall be presented at the office of the Boston Railroad Holding Company in Boston, Massachusetts, to be stamped as entitled to such preference" (Record, pp. 82-83). The certificates for the publicly held shares of preferred stock were thereafter stamped accordingly (Record, pp. 44-45).

It is clear that the 1923 decree thereby accorded to the publicly held preferred stock an explicit preference "in any liquidation" of the Holding Company, as against the New Haven's holdings of preferred or common stock in that company. It is important to note that it was the 1923 decree which established this preference and priority, and not State principles of equity, or the Massachusetts Legislature. Only the 1923 decree defined the rights of the publicly held preferred shares other than in merely general terms of guaranty or preference. The 1923 decree explicitly spelled out the implications, and adjudicated the existence of a priority in the event of *any* disposition of the assets of the Holding Company.

No appeal was ever taken from the 1923 decree, and the decree has never been vacated or modified. The Court in those proceedings had jurisdiction of the parties and of the subject matter, and there is no basis for any collateral attack on the decree, in the instant proceeding or elsewhere. The decree must be given full force and effect.

Surely the New Haven is in no position to complain of that decree. The New Haven itself, in its petition asking for modification of the 1914 decree and the restoration to it of the Holding Company stock transferred to the trustees, asked that the very priority here sought be accorded the publicly held preferred stock, and it made that request because it recognized that such a condition might be prerequisite to the granting of the relief sought by it.

The majority of the Court below took the position that the decree in the anti-trust proceedings did not *create* any priority, but merely recognized a priority upon well settled equitable principles deriving from the New Haven's guaranty, and that the priority fell when the guaranty was discharged in the reorganization proceedings. The distinction is at best tenuous and, we think, non-existent. Here was a decree declaring the existence of the right of priority in the publicly held preferred shares. The source of that declaration and the reasons for the conclusion that a priority existed, are not now important. The fact is, as the Massachusetts Court itself stated, that the anti-trust decrees "undertook to confirm and perpetuate that subsisting right" (Record, p. 98). We are not aware that material differences should follow from the choice of words with which to describe the intent of the anti-trust decrees.

One of the Judges of the Court below (Counihan, J.), in a separate concurring opinion, stated that he was of the opinion that the effect of the 1923 decree in the anti-trust suit "was to subordinate the rights of the preferred stock of the holding company held by the New Haven to the rights of the publicly held preferred stock in any liquidation of the holding company" (Record, p. 105). We believe that no other conclusion is reasonably possible. The 1923 decree was the result of a petition by the New Haven. It requested such a declaration as to priorities as a condition of ultimate relief. The declaration was accordingly made in the 1923 decree, precisely as prayed for. There is nothing in its text which relates the priority to the guaranty, or makes the priority depend upon any rule of State law or act of State Legislature.

The Power of the Federal Court

The majority of the Court, however, indicated that it interpreted the decrees in the anti-trust suit as it did

because otherwise there would be "serious questions" with regard to the power of the Federal Court to make a decree in an anti-trust suit establishing such a priority (Record, pp. 98-99). In this, we submit, the Court was in error.

Even if we assume that it might have been wrong for the Federal Court to have inserted in its decree a provision with respect to the priority to be accorded to the public holders of the preferred stock of the Holding Company, the decree cannot be collaterally attacked in a subsequent proceeding in a State court. As this Court held in analogous circumstances in *Swift* v. *United States*, 276 U. S. 311, 331, "the error, if any, does not go to the jurisdiction of the court. The power to enjoin includes the power to enjoin too much". No appeal having been taken from the 1923 decree, and there being no jurisdictional defect in it, the Massachusetts court was required to give full effect to that decree in the instant proceedings. Cf. *United States* v. *United Mine Workers*, 330 U. S. 258, 293-294; *Howat* v. *Kansas*, 258 U. S. 181, 189-190.

It was within the power of the Court in the anti-trust proceedings to provide for a preference for the public holders of the preferred stock of the Holding Company in the event of liquidation of the company. Surely, the degree of control of the New Haven over the Boston and Maine Railroad would be affected by whether the public stockholders rather than the New Haven had a prior lien upon the stock of the Boston and Maine Railroad owned by the Holding Company. There is nothing to show that the Court would have been agreeable to restoring the stock of the Holding Company to the New Haven, without some provision, such as that suggested by the New Haven itself and incorporated in the 1923 decree, granting the public stockholders preference as against the New Haven in the event of *any* liquidation.

The Effect of the Plan of Reorganization

We repeat, however, even under the view of the Massachusetts court that the 1923 decree merely "undertook to confirm and perpetuate a subsisting right" to priority on the part of the publicly held stock, that the priority was not disposed of because the guaranty was discharged. Whether that right of priority was created by the 1923 decree or whether its existence was merely "confirmed and perpetuated", the fact remains that that right was confirmed in these federal decrees and subsequently confirmed in the New Haven's reorganization proceedings. The court in those proceedings explicitly decreed that that right was in no way to be impaired by the provisions of the Plan of Reorganization. What is more, the Plan seems to have anticipated and disposed of the very question here in issue, for, as we pointed out above, the Plan protected "any right of the public holders" "to realize on the lien or security" of the assets of the Holding Company—regardless of the source of that right and whether it derived from State judicial or State legislative sources or from Federal decrees (Record, p. 39):

> "Nothing herein contained shall in any way impair any right of the public holders of the 24,150 preferred shares of the Boston Railroad Holding Company to realize on the lien or security of the shares of the capital stock of the Boston & Maine Railroad held by said Holding Company whether such right be at common law or under the statutes of Massachusetts, particularly Stat. 1909, Chap. 519, and Stat. 1910, Chapter 639, *or under the decrees of the United States District Court for the Southern District of New York under date of October 17, 1914, and June 4, 1923.*" (Italics ours.)

It is plain that the purpose of this qualifying provision was to avoid any possible inference that the non-assumption of the guaranty by the reorganized company was in any way intended to defeat or impair the right

of priority of the publicly held preferred stock. The very juxtaposition of these provisions permits of no other inference.

The Massachusetts Court preferred to stress the provisions of the consummation decree in the reorganization proceedings discharging the New Haven from liability on its guaranty, and vesting the New Haven's property in the reorganized company free and clear of all claims, liens and encumbrances. The consummation decree, however, must be read in conjunction with the Plan of Reorganization approved by the Court. That Plan, as pointed out above, explicitly limits the possible consequences that might otherwise be attached to the bald provisions of the consummation decree, and the Massachusetts court was not free to ignore it. Section 205(f) of Title 11 of the U. S. Code provides that "upon confirmation by the judge, the provisions of the Plan [of Reorganization] and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders * * *, and all creditors * * *".

Thus, in interpreting the consummation decree in the reorganization proceedings as terminating the right of priority of the public stockholders, the Massachusetts court disregarded the clear provisions of the Plan of Reorganization directing the survival of that very right. The public stockholders stand deprived of rights declared and confirmed by the 1923 anti-trust decree and by the decrees in the reorganization proceedings.

Improper Effect Given to the Discharge, Under General Law of Bankruptcy

Even if we put aside the saving provision of the Plan of Reorganization, and even if we assume moreover that the public stockholders' right of priority derived solely

from the guaranty, it does not follow that the discharge of the New Haven's liability on its guaranty operated to defeat that priority. The Massachusetts court overlooked a well settled doctrine in bankruptcy that:

> "A discharge is neither a payment nor an extinguishment of a debt. When properly pleaded, it is a bar to the enforcement of an existing debt by legal proceedings, and, thus, it amounts merely to a personal defense which is waived if the debtor chooses not to avail himself of it. A discharged debt may be renewed by a new promise * * *." (*In re Innis*, 140 F. 2d 479 (C. C. A. 7th), cert. den. 322 U. S. 736.)

As this Court pointed out in *Zavelo* v. *Reeves*, 227 U. S. 625, 629, the theory is that "the discharge destroys the remedy but not the indebtedness".

It is submitted that a discharge granted in reorganization is of the same tenor as a discharge granted in bankruptcy. Since, then, the discharge does not destroy "the indebtedness", equitable rights or incidents to those rights which may have had their origin in such indebtedness are similarly not destroyed (See 1 Collier on Bankruptcy, §17.27, pp. 1654-1655). In the instant case the New Haven was relieved by the reorganization of liability for the indebtedness represented by the guaranty, but priority rights (incident, we will assume, to such guaranty) survived the discharge and cannot be affected by it. In the light of this principle, the explicit provisions of the Plan of Reorganization discussed above seem to us to make this conclusion certain.

It does not matter if we take the position taken by the Massachusetts court, that the 1923 decree in the anti-trust proceedings, in providing for the public stockholders' priority right, merely "undertook to confirm and perpetuate a subsisting right". The right so "confirmed and

perpetuated'' could not be defeated or impaired in the subsequent reorganization proceedings merely by the discharge of the guaranty. On the Massachusetts court's own assumption, the 1923 decree at least transformed the priority right from an inchoate right based on equitable principles into a right confirmed and recognized by a court's decree. Until that decree was reversed on appeal or duly vacated or modified, the rights declared by it continued with full force and effect. The mere discharge of the guaranty could not of its own force operate to alter or modify that decree or the rights declared by it.

Conclusion

The decision of the Massachusetts court erroneously deprives the public holders of the preferred stock of the Boston Railroad Holding Company of valuable property rights declared and confirmed by decrees duly entered by the Federal Courts in prior anti-trust and reorganization proceedings affecting the New Haven. Questions of general importance as to the meaning and effect of such decrees are presented, as well as an important question in the general law of bankruptcy. It is accordingly respectfully submitted that the petition for a writ of certiorari be granted.

Respectfully submitted,

WILLIAM T. GRIFFIN,
Attorney for Petitioners.

HENRY COHEN,
ARTHUR KARGER,
Of Counsel.

FILED
MAR 25 1952
CHARLES ELMORE CROPLE
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 593.

JAMES B. MAGENIS, F. W. APPLESTEIN,
CHARLES A. BODIE ET AL.,
Petitioners,

v.

BOSTON RAILROAD HOLDING COMPANY ET AL.

BRIEF ON BEHALF OF RESPONDENT NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY IN OPPOSITION TO ALLOWANCE OF PETITION.

JOHN L. HALL,
RICHARD WAIT,
Attorneys for Respondent.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

	Page
The petitioners have no standing	2
The position of the petitioners with reference to the litigation	3

Table of Authorities Cited.

CASES.

Cutting, ex parte, 94 U.S. 14	2
Guion v. Liverpool, London, & Globe Ins. Co., 109 U.S. 173	2
Leaf Tobacco Board of Trade of the City of New York, ex parte, 222 U.S. 578	2